UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

WAYNE SMITH, Plaintiff, v. CHRIS NELSON, in his official capacity as Secretary of State of South Dakota, MIKE MILSTEAD, in his official capacity as Minnehaha County Sheriff, Defendants.	)	Civ. 11-4001 STATE'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF STATE'S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Procedural History

On July 6, 2010, pursuant to SDCL § 23-7-7.1, the Minnehaha County Sheriff denied Mr. Smith a concealed pistol permit. *See* Brief in Support of Motion for Preliminary Injunction or Temporary Restraining Order (Doc. 5, Attachment 2). On August January 3, 2011, Plaintiff filed a Complaint against Chris Nelson, in his official capacity as Secretary of State and Mike Milstead, in his official capacity as Minnehaha County Sheriff. (Doc. 1). The Complaint filed by Plaintiff alleges an equal protection violation in the denial of a concealed pistol permit under SDCL § 23-7-7.1 and seeks relief pursuant to 42 U.S.C. § 1983. On January 3, Sheriff Milstead was served a copy of the Complaint (Doc. 10) on that same day, the Attorney General was mailed notice of Plaintiff's intent to challenge the constitutionality of SDCL § 23-7-7.1. Thereafter, on January 11, 2011, the Secretary of State was served with a copy of the Complaint. The South Dakota Attorney General was served on January 14, 2011.

Statement of the Legal Issue

Whether SDCL 23-7-7.1(8) violates the Equal Protection clause of the United States Constitution.

Argument

SDCL 23-7-7 provides that a concealed pistol permit shall be issued by the sheriff of the county where the applicant resides if the applicant meets the requirements of SDCL 23-7-7.1. The sheriff is required to conduct a computer check of available on-line records, including a criminal history check, for purposes of analyzing these requirements. SDCL 23-7-7. Several types of individuals are not qualified for a permit, including minors and persons with a history of violence or drug abuse. SDCL 23-7-7.1. In addition, the statute requires a permit holder to be "a citizen of the United States." SDCL 23-7-7.1(8).

Standard

Smith raises a challenge to SDCL 13-7-7.1(8) under the U.S. Constitution. See Complaint (Doc. 1). The standard for reviewing the constitutionality of a statute is firmly established. "Challenges to the constitutionality of a statute face a significant and heavy burden." *Benson v. State,* 2006 S.D. 8, ¶ 40, 710 N.W.2d 131, 145 (Zinter, J., concurring) (citation omitted). "Statutes are presumed constitutional: challengers bear the burden to prove beyond a reasonable doubt that a statute violates a constitutional provision." *Kraft v. Meade County ex rel. Bd. of County Com'rs*, 2006 S.D. 113, ¶ 2, 726 N.W.2d 237, 239 (citation omitted).

Smith submits a copy of his application and green card in support of his constitutional claim. (Doc. 5 attachment 1 and 2). This record is insufficient to mount an "as applied" challenge to the State of South Dakota. *See State v.*

Andrews, 2007 S.D. 29, ¶ 8, 730 N.W.2d 416, 420 (As applied challenges require specific facts as applied to Plaintiff). Furthermore, Smith's Complaint does not allege the State of South Dakota itself acted to specifically deny him a constitutional right. *See generally* Complaint (Doc. 1). There is simply no showing that the State of South Dakota acted to specifically deny Mr. Smith a constitutional right. Moreover, Smith may not bring a § 1983 claim against the State itself as it is not a person subject to suit thereunder. *Will v. Michigan Department of State Police*, 491 U.S. 58, 70-71 (1989) (Holding that "neither a State nor its officials acting in their official capacities are "persons" under § 1983"). Rather, any challenge against the State should be considered a facial challenge to the constitutionality of SDCL 23-7-7.1. Because Smith is mounting a facial challenge, his burden is even greater. He must establish "that no set of circumstances exists under which the Act would be valid." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1184, 1190 (2008).

The Constitutionality of SDCL 23-7-7.1

At the outset, the State notes that Smith is not prohibited from owning and possessing a pistol. Smith is not alleging an infringement of his Second Amendment rights guaranteed by the United States Constitution. His allegation, rather, is that he is not eligible to obtain a concealed pistol permit. In turn, Smith asserts that SDCL 23-7-7.1(8) violates the Equal Protection provision of the United States Constitution.

1. Smith's Claim does not give rise to an equal protection challenge

The Fourteenth Amendment states, "[N]or shall any State ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. In an equal protection challenge, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *In re: Interest of Z.B.*, 2008 S.D. 108, ¶ 5, 757 N.W.2d 595, 598 (citation omitted). Smith claims that lawful permanent residents are a suspect class which exposes the statute at issue to a strict scrutiny analysis under an equal protection analysis.

In general, an equal protection claim requires "that state actors treat similarly situated people alike." *Habhab v. Hon*, 536 F.3d 963, 967 (8th Cir. 2008) (citing *Bogren v. Minnesota*, 236 F.3d 399 408 (8th Cir. 2000)). The flip side of this is that "state actors may, however, treat dissimilarly situated people dissimilarly without running afoul of the protections afforded by the clause." *Id.* "The Fourteenth Amendment does not guarantee that all person bust be dealt with in an identical manner." *Mills v. City of Grand Forks*, 614 F.3d 495, 500 (8th Cir. 2010) (Citing *Baxstrom v. Herold*, 383 U.S. 107, 111 (1996)). As a threshold matter, therefore, Smith must demonstrate that the State treated him less favorably than similarly-situated people based on his alienage. *Habhab*, 536 F.3d at 967.

Smith's Complaint alleges that SDCL 23-7-7.1 discriminates based on alienage. Complaint at ¶ 17 (Doc. 1). The Complaint, however, fails to allege or demonstrate that similarly situated individuals were treated differently. Reading between the lines, one may assume that Mr. Smith's position is that lawful permanent residents (non-citizens with "green cards") are otherwise similarly situated to citizens of the United States for the purposes of obtaining a concealed pistol permit in South Dakota. If this is Mr. Smith's position, it assumes too much.

SDCL 23-7-7.1 provides:

> Requirements for issuance of temporary permit--Time--Appeal of denial. A temporary permit to carry a concealed pistol shall be issued within five days of application to a person if the applicant:
>
> (1) Is eighteen years of age or older;
>
> (2) Has never pled guilty to, nolo contendere to, or been convicted of a felony or a crime of violence;
>
> (3) Is not habitually in an intoxicated or drugged condition;
>
> (4) Has no history of violence;
>
> (5) Has not been found in the previous ten years to be a "danger to others" or a "danger to self" as defined in § 27A-1-1 or is not currently adjudged mentally incompetent;
>
> (6) Has physically resided in and is a resident of the county where the application is being made for at least thirty days immediately preceding the date of the application;
>
> (7) Has had no violations of chapter 23-7, 22-14, or 22-42 constituting a felony or misdemeanor in the five years preceding the date of application or is not currently charged under indictment or information for such an offense;
>
> (8) Is a citizen of the United States; and
>
> (9) Is not a fugitive from justice.
>
> A person denied a permit may appeal to the circuit court pursuant to chapter 1-26.

In order to verify the above subsections, the sheriff is required to execute a background investigation that includes a computer check of available on line-records. SDCL 23-7-7. One of the main avenues for performing the on-line check is the Interstate Identification Index or Triple I. The Triple I is a nationwide database maintained by the FBI and contains a compilation of criminal information uploaded by the individual states. For South Dakota, SDCL 23-5-4 outlines the process and crimes for which information is compiled and entered into the national system. Pursuant to this statute, arrests for "felonies and misdemeanors," exclusive of limited exceptions, are compiled and sent to the Division of Criminal Investigation for entry into the interstate database. Access to Triple I is granted to each state. A search of this database is an instant on-line check of a person's compiled criminal history throughout the United States. Under this system, citizens of the United States are subject to thorough recordation and collection of arrest and conviction information beginning at the age of majority, or earlier if charged as an adult.[1]

On the other hand, a similar system of recording, collecting and reporting criminal history information for individuals who are not citizens of the United States does not exist. In order to obtain information on citizens of other countries, any request for a background check must be done through INTERPOL. A complex series of contacts may or may not eventually result in a requesting state receiving information on the person of interest. Moreover, the crimes subject to reporting under SDCL 23-5-4 may not be considered crimes in an individual's home country nor may they be required to be reported to anyone, let alone reported to an instantly searchable on-line database. In practice, the information, if any, received through INTERPOL is not similar to in either quality or quantity the information instantly available to law enforcement in the United States. In turn, the potential

[1] A complete narrative of the compilation and submissions of criminal history information will be presented by witness at the Preliminary Injunction Hearing, January 27, 2010.

for discovering disqualifying information is greatly reduced when performing a background search on non-citizens.

Statically speaking then, if an equal number of non-citizens and citizens apply for concealed pistol permits, the statutory framework coupled with the availability of background information, favors individuals who are not citizens of the United States. As such, a greater number of citizens would be denied a permit to carry a concealed pistol than non-citizens. At best, the citizens and non-citizens of the United States are not "similarly situated" and it is furthermore likely that any discriminatory effect would operate against citizens rather than non-citizens of the United States. Smith's equal protection claim therefore fails because he cannot show he is being treated differently than "similarly situated" individuals. Likewise, he cannot demonstrate that the State treated him *less favorably* than similarly-situated people based on his alienage. *Habhab,* 536 F.3d at 967.

2. *The ability to regulate concealed pistol permits was specifically reserved to the States*

Smith further asserts that "there are no federal laws requiring United States citizenship as a prerequisite for an application for or the issuance of a license to purchase, carry, transport, or carry [sic] a concealed weapon." Complaint at ¶ 15 (Doc. 1). On the other hand, nothing in the federal immigration provisions grants lawful permanent residents the right to obtain a concealed weapons permits. Instead, Congress specifically reserved the right of states to regulate such areas not specifically in conflict with federal law. By implication, such a reservation includes the ability to issue concealed pistol permits.

Regarding the federal firearms laws, Smith is correct that those laws do not prohibit lawful permanent residents from possessing a firearm. 18 U.S.C. 922(g)(5). But again, possession of a firearm is not the issue. The issue is possession of a firearm *concealed.* The power to determine who can carry *concealed* is specifically reserved for the states.

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

18 U.S.C. 927. Clearly, then, SDCL 23-7-7.1(8) is not preempted by federal law.

U.S. Supreme Court precedent implies that this in and of itself means the statute is subject to a rational basis analysis under the equal protection clause. Preemption may explain decisions in this area better than equal protection analysis. *Toll v. Moreno,* 458 U.S. 1, 11 n.16, 102 S.Ct. 2977, 2983 (1982). Although the *Toll* decision was based on a supremacy clause analysis rather than equal protection analysis, it specifically pointed out that "*Takahashi* and *Graham* stand for the broad principle that 'state regulation not *congressionally sanctioned* that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." *Id.*, 458 U.S. at 12-13 (citation omitted) (emphasis added). Congress has specifically reserved the power to regulate concealed weapons permits to the states. 18 U.S.C. 927. This should subject the statute at issue to rational basis analysis, not strict scrutiny. *See Cid v. South Dakota Department of Social Services,* 1999 S.D. 108, ¶ 18, 598 N.W.2d 887, 892 (Administrative rule, implementing federal legislation, did not conflict with national policies regarding alienage or place more burdens than federal law upon aliens and hence was subject to rational basis scrutiny).

3. *The regulation of concealed pistol permits is a valid exercise of a State's police power*

In addition, rational basis review applies because the statute at issue is a proper exercise of the State's police powers. For example, the U.S. Supreme Court has said that courts should defer to the experience of the states in determining whether non U.S. citizens should be allowed to hunt waterfowl in a state. *Patsone v. Commonwealth of Pennsylvania,* 232 U.S. 138, 144, 34 S.Ct. 281, 282 (1914). Although the Supreme Court has modified its equal protection analysis since *Patsone* was decided, it has not overruled the case. *See Graham v. Richardson,* 403 U.S. 365, 373-74 (1971). *See also State v. Kemp,* 44 N.W.2d 214, 218 (S.D. 1950) (Upholding State's ability to prohibit waterfowl hunting by non-residents).

In fact, two states have upheld firearms restrictions which go beyond what South Dakota has done. In these cases, the courts upheld laws making it illegal for an alien to even possess dangerous weapons because of the State's police powers. *State v. Beorchia,* 530 P.2d 813 (Utah 1974); *State v. Vlacil,* 645 P.2d 677 (Utah 1982); *Ex Parte Rameriz,* 226 P. 914 (Cal. 1924). In Utah, the court specifically rejected an equal protection challenge, pointing out that "[t]he Fourteenth Amendment is not generally applied so as to restrict exercise of police powers of the State." *Beorchia,* 530 P.2d at 814.

In the California case, the California Supreme Court reviewed U.S. Supreme Court precedent regarding regulations affecting aliens but made the following distinction: "[T]here were involved in none of them the subject of public peace, public safety, public security, or collateral subjects as affected by the possession of firearms." *Ramirez*, 226 P. at 641. The court determined that the regulation at issue was a proper exercise of police power and safeguarding public peace and security. *Id.*

Therefore, the classification is not arbitrary and has a rational basis. The classification is not "without adequate determining principle." *In re: Davis*, 2004 S.D. 70, ¶ 7, 681 N.W.2d 452, 455 (citation omitted). In addition, there is a "plausible" or "conceivable" reason for the distinction. *In re: Interest of Z.B.*, 2008 S.D. 108, ¶ 9, 757 N.W.2d at 599-600.

It can be judicially noticed that concealed weapons create a greater potential danger than other weapons. Fed. R. Evid. 201. Clearly, the State has a "legitimate interest in limiting access to weapons peculiarly suited for criminal purposes." *Pencak v. Concealed Weapon Licensing Board*, 872 F.Supp. 410, 414 (E.D. Mich. 1994). "[T]he legislature [has] determined that possession of firearms by aliens [is] harmful, and [the court should] not quarrel with the decision of that body." *Vlacil*, 645 P.2d at 680.

Even if strict scrutiny applies, however, the statute is narrowly tailored to achieve a compelling state interest. *In re: Certification of Question of Law*, 2000 S.D. 97, ¶ 16, 615 N.W.2d 590, 597. It is obvious from the language of the statute that one of the main purposes of SDCL 23-7-7.1 is to prohibit those with criminal or otherwise dangerous backgrounds from carrying concealed. However, thorough "computer check[s] of available on-line records," SDCL 23-7-7, is more difficult to perform on non-citizens. The State is certainly justified in requiring a full background check performed as part of the naturalization process before it issues a permit. *See* 8 C.F.R. 335.2.

Preliminary Injunction

An injunction is an extraordinary remedy reserved for instances where the right to relief is clear. *Crow Creek Sioux Tribal Farms, Inc. v. United States Internal Revenue Service*, 684 F. Supp.2d 1152, 1156 (D. S.D. 2010) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102, S.Ct. 1798, 72 L.Ed.2d 91 (1982)). Where an injunction seeks to enjoin a duly enacted statute, the Court must make a threshold finding that the moving party is "likely to prevail on the merits." *Planned Parenthood v. Rounds*, 530 F.3d 724, 732-733 (8th Cir. 2008). This more rigorous standard helps to ensure "that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately differential analysis." *Planned Parenthood*, 530 F.3d at 733. If this threshold showing is made, the court may then proceed to examine the remaining *Dataphase* factors. *Planned Parenthood*, 530 F.3d at 732. The *Dataphase* factors are: (1) the threat of irreparable harm to the Plaintiffs; (2) the state of the balance of harm and the injury that granting the injunction will inflict on the Defendant; (3) the probability Plaintiffs will succeed on the merits; and (4) the public interest. *See Dataphase Systems Inc. v. CL Systems Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). In *Winter v. Natural Resources Defense Council, Inc.* the United States Supreme Court clarified that plaintiffs seeking preliminary relief must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. 7, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008) (italics in original).

Initially, based on the above arguments and authorities the State submits that Mr. Smith fails to meet the threshold requirement that he is "likely to prevail on the merits." *Planned Parenthood v. Rounds*, 530 F.3d 724, 732-733 (8th Cir. 2008). As such, the State would submit that an analysis of the remaining factors is not necessary. In the event the Court wishes to examine the Dataphase factors, the State submits the following.

1. *Threat of irreparable harm*

Mr. Smith has not demonstrated that his inability to legally carry a pistol concealed pistol based on his alienage is causing harm. As noted above Mr. Smith may legally possess and carry a pistol, he simply may not carry concealed without a permit. Smith has not shown or alleged any actual harm in the inability to carry a concealed pistol.

Furthermore, Mr. Smith is not currently suffering any harm that cannot be addressed in another manner. As Mr. Smith notes, he has been a resident since 1979. Brief in Support of Restraining Order (Doc. 5). The decision not to become a citizen is controlled solely by Mr. Smith not the State of South Dakota. Furthermore, Mr. Smith could obtain a non-resident permit to carry a concealed pistol from another state. *See* SDCL § 23-7-7.4 (recognizing the validity of other State's permits).

Mr. Smith has alleged but not proven that his alienage alone is the causal reason for his denial. Other sections of SDCL 23-7-7.1 may apply to preclude Mr. Smith from possessing a permit to carry a concealed pistol. Accordingly, Mr. Smith cannot show the State is responsible for the denial of his permit.

2. *The state of the balance of harm and the injury that granting the injunction will inflict on the Defendant.*

As noted above, the State asserts that Smith has not showing harm, nor has he shown that the State is responsible for his denial. Weighing in favor of the State, is the public policy in ensuring that individuals permitted to carry concealed pistols have meet all of the conditions of SDCL 23-7.7.1. The State cannot assure the public protection if a complete and accurate background check is unavailable. As explained above, non-citizens are not subject to the same collection, reporting, and search ability of criminal history information as citizens.

3. *The probability Plaintiff will succeed on the merits.*

As described above, the State does not believe that Plaintiff will succeed on the merits. This is especially true as applied to the State where Plaintiff's facial challenge would have to show no "set of circumstances exists under which the Act would be valid." *Washington State Grange*, 552 U.S. 442 at 449.

4. *The public interest*

The State Legislature's enactment of SDCL 23-7-7.1 indicates a public interest in applicants meeting each condition. Furthermore, as described above, the public has an interest in ensuring individuals applying for and receiving concealed pistol permits pose no threat to the public as demonstrated through a thorough and complete background check.

Conclusion

Based on the above arguments and authorities, the State respectfully submits that Mr. Smith's Equal Protection claim under the Fourteenth Amendment of the United States Constitution fails. The State requests this Court dismiss the Complaint in its entirety or grant judgment in favor of the State of South Dakota.

Dated this 25th day of January, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Defendant Nelson's Motion to Dismiss was filed by electronic means pursuant to Fed. R. Civ. P. 5(b)(2)(D) (and the Court's Electronic Filing Standing Order) on this 25th day of January, 2011, to the following:

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